

No. 80759-1

MADSEN, C.J. (concurring)—I agree with the majority that the trial court’s termination analysis is in error and the case should be reversed and remanded. I write separately because I believe the reason the analysis is in error is that the trial court’s finding under former RCW 13.34.180(1)(e) (2001), regarding the likelihood the father’s deficiency could be remedied in the near future, is not supported by clear, cogent, and convincing evidence.

#### Discussion

In order to grant a petition terminating parental rights, the court must find all of the following factors: (a) the child is a dependent, (b) the court has entered an RCW 13.34.130 dispositional order, (c) the child has been removed from the parent’s custody for 6 months, (d) services to correct parental deficiencies have been offered, (e) “there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future,” and (f) continued contact with the parent “clearly diminishes the child’s prospects for early integration into a stable and permanent home.” RCW 13.34.180(1).

Specifically, factor (e) under RCW 13.34.180(1) is defined as follows:

That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:

- (i) Use of intoxicating or controlled substances . . .
- (ii) Psychological incapacity or mental deficiency of the parent . . .

In order to terminate parental rights, the trial court must find all of the RCW 13.34.180(1) factors proved by clear, cogent, and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Washington courts have previously found the RCW 13.34.180(1) factors focus on the adequacy of the parent. *In re Dependency of S.G.*, 140 Wn. App. 461, 467, 166 P.3d 802 (2007) (citing *In re Welfare of C.B.*, 134 Wn. App. 943, 952, 143 P.3d 846 (2006)); *In re Welfare of Churape*, 43 Wn. App. 634, 638-39, 719 P.2d 127 (1986). This is in contrast with step two of the parental termination analysis under RCW 13.34.190(2), which focuses on the best interests of the child. *Id.*

The trial court found A.B.'s father, Salas, had taken sufficient actions to cure his deficiency and had "made almost heroic efforts" to be involved in A.B.'s life. Clerk's Papers (CP) at 90-91. This finding is supported by clear, cogent, and convincing evidence in the record.

Salas has actively participated in custody proceedings and has taken steps to create and adhere to a plan to create a stable, healthy environment for A.B. Although he was unable to leave the state of Nevada, he participated in the initial dependency hearing through counsel. He participated in the June 2005 bench trial and made significant efforts to address the court's concerns. He resumed visitation, obtained a domestic violence evaluation, and participated in domestic violence treatment. In August 2005, he presented the court with a plan to treat, manage, and monitor his substance abuse and to continue participation in a domestic violence program. He located resources to benefit A.B. including a pediatrician, elementary school, and family counselor. In late August, he ended his dysfunctional marriage with C.S.

He has also taken steps to manage his drug addiction. According to the trial court's written findings, Salas last abused drugs in late 2001. He continued to participate in a Nevada drug court program and found steady employment during the time he was prohibited from leaving Nevada.

He has taken proactive steps to visit A.B. and positively engage in her life. When Salas successfully completed his Nevada drug court program, he visited A.B., and shortly thereafter, moved to Yakima. Within two days, he met with the Department of Social and Health Services (DSHS) caseworker who conducted a urine test and parenting assessment. He began visiting A.B. regularly and frequently under supervision. The caseworker was very positive about the progress in Salas's relationship with A.B., in which A.B. exhibited trust in Salas as a dependable, consistent figure in her life. The

caseworker planned to increase unsupervised visitation and place A.B. with Salas permanently, despite T.L.'s opposition.

Salas's visitation was interrupted for four months by his arrest (and subsequent immigration hold) for an incident in which he pushed a police officer who intervened in a fight between Salas and his then girl friend, C.S. Once released, Salas resumed visitation every week for a year, despite A.B.'s newly exhibited reluctance to interact with or bond with Salas, which the caseworker attributed to the gap in visitation. Salas missed one visit scheduled in February 2005, when he moved to Las Vegas, but saw A.B. again in May and arranged for a new visitation schedule with the DSHS caseworker. When the DSHS caseworker informed him weekend visits were not available, Salas accommodated the schedule and agreed to visit on Friday. Again, when he visited, A.B. refused to interact with him, and he did not see her again before the trial on June 13, 2005. After the trial, he visited A.B. every two weeks until his parental rights were terminated. The trial court found that Salas's inability to bond was not caused by Salas.

Based on these facts, the trial court concluded that "it is in the child's best interests to maintain a relationship with her father" provided the relationship did not jeopardize A.B.'s relationship with her current caregiver, T.L., but ultimately terminated Salas's parental rights when Salas and T.L. could not reach an agreement on an open adoption. Mem. Op. at 15-16. The court's findings, which do not include a finding that Salas was a deficient parent, are inconsistent with its conclusion that RCW 13.34.180(1)(e) was met. If Salas was not deficient, the court could not as a legal matter

find his deficiency could not be cured.

In addition, evidence suggests the adoptive parent, T.L., may have been the motivating factor behind the child's inability to bond. The DSHS caseworker indicated that T.L. disapproved of Salas's visitation rights early on. During visitation, A.B. continually looked to T.L. rather than engaging with Salas.<sup>1</sup> T.L. did not reach an agreement with Salas that would facilitate the open adoption the trial court favored. The trial court also noted the inability of A.B. to bond with Salas was possibly "the result of subtle changes in the child's relationship with her caretaker[, T.L.]." CP at 91. Given the evidence, the trial court erred by failing to consider T.L.'s influence (and perhaps interference) in analyzing whether Salas was unlikely to be able to cure any deficiencies.

In sum, the trial court erred by concluding RCW 13.34.180(1) factor (e) was met by clear, cogent, and convincing evidence because the evidence does not support finding that a deficiency on the father's part caused the inability to bond. The trial court also erred by failing to consider facts in the record that suggest the adoptive parent T.L. may have contributed to the child's inability to bond. Because the trial court erred, the termination conclusion must be reversed and the case must be remanded to the trial court for proceedings consistent with this opinion.

---

<sup>1</sup> Although this could be attributed to the presence of T.L. as a consistent person in her life, rather than an unhealthy influence of T.L., it is some evidence.

AUTHOR:

Chief Justice Barbara A. Madsen

---

WE CONCUR:

---

Justice Charles W. Johnson

---

---

---

---

---